# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

*v.*

SHAWN E. EICHMAN, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

*v.*

MARK JOHN HAGGERTY, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON*

## BRIEF FOR THE SPEAKER AND LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, AMICI CURIAE

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## STATEMENT OF THE CASE

The Speaker and Leadership Group of the United States House of Representatives ("House *Amici*") respectfully submit this brief as *amici curiae*, to provide an offi-

cial defense of a challenged Act of Congress, the Flag Protection Act of 1989 ("the Act"), Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700).[1] Last year, in *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), this Court struck down Texas's provision prohibiting "seriously offensive" desecration of venerated objects, including flags, as a non-neutral imposition on expressive conduct. That decision called into question the existing federal prohibition against "cast[ing] contempt" on the flag, 18 U.S.C. §700, since it might also have been challenged as non-neutral.

In response, the House and Senate Judiciary Committees, through their subcommittees of jurisdiction, each held hearings to receive official, scholarly, and public views.[2] The House Judiciary Committee Report on the Act summarizes what they found. "At the Subcommittee's five hearings, witnesses represented three basic positions: Congress should (1) do nothing; (2) amend the Constitution; or (3) amend the current federal flag desecration statute to conform to the *Texas* v. *Johnson* opinion." H.R. Rep. No. 231, 101st Cong., 1st Sess. 7 (1989). Congress found little support for the choice to "do nothing," and shelved, for now, the constitutional amendment, notwithstanding its powerful support.[3] Instead, Congress chose to

[1] For the purposes of this brief, the Leadership Group joining the Speaker consists of Majority Leader Richard A. Gephardt and Majority Whip William Gray III. Republican Leader Robert Michel and Republican Whip Newt Gingrich declined to join in this brief. Counsel for the Defendants and the Solicitor General have consented to the filing of this brief. Their letters of consent are being lodged with the Clerk of the Court.

[2] *See Hearings on Measures to Protect the Physical Integrity of the Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) ("*Senate Hearings*"); *Statutory and Constitutional Responses to the Supreme Court Decision in Texas* v. *Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) ("*House Hearings*").

[3] President Bush and Attorney General Thornburgh urged a constitutional amendment. *Senate Hearings* at 119. The House and Senate Republican Leaders testified in support of constitutional amendments. *House Hearings* at 30 (Rep. Michel); *Senate Hearings* at 376 (Sen. Dole).



comply with *Texas* v. *Johnson* by following its prescription that the Constitution permits "protecting the physical integrity of the flag in all circumstances." 109 S.Ct. at 2543.

As Chairman Brooks of the House Judiciary Committee, the House floor manager, explained, "[t]he committee determined that the Court's basis for striking down the Texas statute was that. . . [r]ather than safeguarding the physical integrity of the flag in all circumstances, the Texas statute made it a crime to abuse the flag in a manner that would 'seriously offend one or more persons. . .'" 135 Cong. Rec. H5500 (daily ed. Sept. 12, 1989). Since "the Court indicated that it would look differently on a content-neutral flag protection statute,. . . H.R. 2978 is designed to conform. . . by removing any language that is content specific. . . ." *Id.*

One leading proponent of the statutory approach was Representative William J. Hughes, a senior member of the Judiciary Committee and the Chairman of that Committee's Subcommittee on Crime. Representative Hughes authored one of the three statutory proposals that the Committee considered in drafting the House version of this legislation. In urging the Committee to follow the statutory route rather than the constitutional amendment route, Representative Hughes examined the extent and basis of the *Texas* v. *Johnson* opinion and concluded that "I believe we can restore protection to the flag by simple statutory changes. We do this by reading, and heeding, the Court decisions, not by denouncing them and desecrating the Court itself." *House Hearings* at 330. Representative Hughes warned the Committee that "the federal law on flag desecration [with its element that the defendant intend to "cast contempt" on the flag] is in even greater constitutional jeopardy than the Texas law." *Id.* at 331.

Representative Hughes based his belief that a statute was constitutionally feasible on two important Supreme Court precedents relied upon by *Texas* v. *Johnson*. The

Chairman of the Crime Subcommittee drew the attention of the Committee to this Court's decision in *United States* v. *O'Brien*, 391 U.S. 368 (1968), explaining "[p]erhaps most important in this regard is the 1968 draft card burning case. . . . O'Brien proclaimed at the time, and stated to the jury, that he [burned his draft card] to express his anti-war beliefs. In short, the facts of the case certainly provided the basis for a claim that the prosecution was aimed at the contents of his expression, not just conduct." *Id.* at 332–33. The Committee was urged to focus on "the rationale of the Court in O'Brien" as being "equally applicable to prosecutions under the proposed amended Flag Desecration Act." *Id.* at 333. Representative Hughes quoted the Court's description of the draft card burning statute: "'It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing [necessarily] expressive about such conduct. The amendment [to the draft laws] does not distinguish between public and private destruction, and it does not punish only destructions engaged in for the purpose of expressing views." *Id.* at 334 (quoting *United States* v. *O'Brien*, 391 U.S. at 375). Based on *O'Brien*, Representative Hughes told the Committee that "a properly drafted statute would not be defeated by the infusion of an element of expression into the act of burning or other physical abuse of the flag." *Id.*

Additionally, Representative Hughes cited, in support of the statutory alternative, *Smith* v. *Goguen*, 415 U.S. 566 (1974), which directly addressed the government's interest in preserving the flag. Representative Hughes quoted from Justice White's concurring opinion in *Goguen*:

> There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise powers necessary and proper for those ends.



> These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolish[ness] to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new nation.
> . . .The United States has created its own flag, as it may. The flag is national property, and the nation may regulate those who would make, imitate, sell, possess, or use it.
> I would not question those statutes which proscribe mutilating, defacement, or burning of the flag or which otherwise protect its physical integrity.

*House Hearings* at 336 (quoting *Smith* v. *Goguen*, 415 U.S. at 586–87 (White, J., concurring) (quotations omitted)). Then, Representative Hughes concluded his argument in favor of a statute:

> As Justice White suggested, we have the right as a nation to establish a national flag, and we have done so. Surely the right to establish that flag carries with it the right to protect it from physical attack. And surely our right to protect it is not so limited and circumscribed that we as a nation must stand by impotently and tolerate the burning or other mutilation of our flag so long as the flag burner utters some expletive against the flag or our nation as he or she ignites it.

*Id.* at 336.

Representative Hughes's views prevailed, as the Committee, and in turn the House and Senate, determined to follow the statutory course based on the language of this Court's prior opinions. The Senate Judiciary Committee report concurred, focusing on the flag's "historic function" for such sovereign purposes as marking "our national presence in schools, public buildings, battleships and airplanes." S. Rep. No. 152, 101st Cong., 1st Sess. 2–3 (1989).[4] Other legislative history similarly pointed out, as

[4] The Senate report traced the original intent back to "the Founders," "the Continental Congress" and "'[Chief Justice John] Marshall

Continued

the Senate floor manager, Chairman Biden, quoted Woodrow Wilson, "'The flag is the embodiment, not of sentiment, but of history.'" 136 Cong. Rec. S7457 (daily ed. June 23, 1989).[5]

On this basis, Congress adopted the Act, which went into effect on October 27, 1989. That day, a flier was circulated in Seattle announcing plans to conduct a rally called a "Festival of Defiance." Events at the rally were filmed, with a videotape that was part of the record below; these events included defendants hauling down, and burning, the flag denoting the federal sovereign's facility of the Post Office building.[6] The United States filed

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and the men of his generation,'" as well as modern scholarly and political figures such as Woodrow Wilson. *Id.* (quoting Oliver Wendell Holmes regarding the generation of the Framers).

[5] Other Members insisted that they "cannot envision the Members of the House and Senate in the First Congress that met in 1789, the Members who wrote those amendments. . . having in mind, even by the furthest stretch of the imagination, that the freedom of speech clause would ever be stretched to the extent" of barring Congress from any flag protection. 136 Cong. Rec. S8087 (daily ed. July 18, 1989) (Sen. Byrd). *See, e.g.*, 136 Cong. Rec. S12593 (daily ed. Oct. 4, 1989) (Sen. Bumpers) (discussing what was meant by "James Madison and John Jay and Alexander Hamilton"); *id.* at S13721 (Sen. Dole) (discussing why "on June 14, 1777, the Continental Congress resolved to create an official — and distinctively — American flag"); *id.* at S13506-07 (Sen. Hatch) (discussing with respect to "James Madison and the other framers at the Philadelphia Convention. . . [that] [t]he framers of the Constitution and the first amendment would have been much more astonished by the proposition that the States lack power to protect the flag from desecration"). Many such statements were made during the debate over whether to adopt a constitutional amendment to protect the flag, a debate overlapping with whether to adopt the Act.

[6] This appeal is taken from the district court's decision granting defendants' motion to dismiss Count II of the Information. The United States Attorney attached to the Information an affidavit by federal agents who were eyewitnesses with a videotape as the accompanying Exhibit A. Affidavit by Steven M. Dean and Stanley R. Pilkey (November 28, 1989), docket entry at Joint Appendix ("J.A.") 20; text at J.A. 36. The videotape consists of film by federal agents supplemented by film from news broadcasts. A transcript of the videotape has been filed with the district court.



an Information charging that the defendants "did knowingly burn a flag of the United States, to wit, the flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. §700(a)(1) and (2).[7] Defendants moved to dismiss that count, asserting that the Flag Protection Act was unconstitutional as applied to the facts. In response, the House and Senate *amici* appeared and joined in the defense of the Act. As the district judge recognized, House *amici* showed a basis for flag protection legislation in the original intent[8] regarding the flag and national sovereignty:

> the United States House of Representatives does not agree with defendants that the government's sole interest in protecting the physical integrity of the flag arises out of its symbolic value. Instead the House argues that Congress enacted the Flag Protection Act because it wished to shield the flag from harm as an incident of sovereignty with a specific legal significance apart from its symbolic value. . . and that protecting the flag protects that sovereignty interest.

J.S. at 12a. The Senate and House *amici* support each other, focusing on complementary aspects of the background and history.[9]

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[7] That was Count II. Count I charged destruction of federal property, namely, that the defendants "did willfully injure or commit a depredation against property of the United States and an agency thereof, to wit, a flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. §§1361-62.

[8] The district court recognized the House's strong showing of the sovereignty interest: "the House recounts the history of the use of the United States flag as an indicator of sovereignty, including numerous instances in which violations of the flag's physical integrity have been deemed threats to the sovereignty of this nation." Jurisdictional Statement ("J.S."), *United States of America* v. *Mark John Haggerty*, No. 89-1434 (filed March 13, 1990), at 12a.

[9] "We rely on the brief amicus curiae submitted on behalf of the Speaker and the Leadership Group of the House of Representatives for further discussion of that power and the unique historical status of the flag." Memorandum of United States Senate As *Amicus Curiae*, *United States* v. *Haggerty*, (No. CR 89-315R filed Feb. 1, 1990), at 31 n. 60.

Although fully apprised of Congress's intent to follow *Texas* v. *Johnson's* physical integrity language, the district judge brushed that intent aside in a footnote, stating that "the Act fails to protect the flag's physical integrity" because "flying the flag in inclement weather *or carrying it into battle*, are not prohibited [by the Act]." J.S. at 12a n.6 (emphasis supplied). Congress's decision to comply with *Texas* v. *Johnson* thus never even received judicial recognition because the district judge equated this Court's language on physical integrity with forbidding the armed forces to carry the flag into battle — a suggestion without support in this Court's opinions, in the legislative history, or anywhere else.[10]

From the district court judgment of dismissal, the United States noted its appeal. Shortly thereafter, the United States District Court for the District of Columbia faced a similar challenge to the Act in *United States* v. *Eichman*, concerning a flag burning on the steps of the Capitol. The *Eichman* senior district judge largely repeated the Seattle case's opinion, which may appropriately be considered the principal case.

## SUMMARY OF ARGUMENT

Congress justifiably adopted a statute which contrasted with the Texas "serious offense" provision struck down in *Texas* v. *Johnson* by providing content-neutral protection for the federal interest in the physical integrity of the flag. To uphold a statute regulating conduct (including the conduct of setting fire to an object to protest governmental policy), the Court has looked for an applicable

[10] The suggestion that the government's admitted inability to protect, by statute or otherwise, the physical integrity of the flag against the ravages of either nature or war hardly can diminish the government's authority to protect the flag from the dangers that are within the province of governmental control. The statute does not condone the damage done to a flag in a storm by the forces of nature or, in a battle, by a foreign enemy. It merely recognizes that neither weather nor the gunfire of an enemy at war with the United States are susceptible to statutory control.



governmental interest apart from suppressing unpatriotic expression. *United States* v. *O'Brien*, 391 U.S. 367 (1968). In its series of flag opinions, particularly Justice Blackmun's key pronouncement in *Smith* v. *Goguen*, 415 U.S. 566, 590-591 (1974) (Blackmun, J., dissenting) (cited with approval, *Texas* v. *Johnson*, 109 S. Ct. at 2543 n.6), this Court recognized a number of governmental interests in flag protection, carefully setting aside as distinct the interest in neutrally "protecting the physical integrity of the flag in all circumstances." *Texas* v. *Johnson*, 109 S. Ct. at 2543. The Eighth Circuit's decision in *United States* v. *William Charles Cary, Jr.*, No. 88-5458, slip op. (8th Cir., filed Feb. 26, 1990), confirmed Congress's decision to comply by upholding 18 U.S.C. §700 against First Amendment challenge earlier this year.

Part II of this brief discusses the sovereignty interest in the flag as a matter of the original intent and understanding of the Framers, particularly James Madison, draftsman of the First Amendment. *See, e.g., Marsh* v. *Chambers*, 463 U.S. 783, 790-91 (1983). While the symbolic role of the flag is now well-established, the flag was an important incident of sovereignty before it was used for symbolic purposes by patriots and others. When the nation's founders first determined to adopt a national flag, they intended to serve specific functions relating to our status as a sovereign nation. Just as the English had protected their flag as part of maintaining sovereignty of the seas, *United States* v. *Maine*, 475 U.S. 89, 96 & n.11 (1986), rather than for viewpoint-suppressive purposes, so the Framers' adoption and protection of the flag were originally intended to obtain proper treatment for the United States as a sovereign nation. Notably, the Continental Congress's goal in its flag enactments was to secure protection for its citizens' rights, specifically the right of its seamen not to be hanged by the English.

A tradition had long developed of punishing flag defacers: "it has often occurred that insults to a flag have been the cause of war, and indignities put upon it. . . have

often been resented and sometimes punished on the spot." *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907). Madison ably articulated the sovereignty interest in the flag on four occasions — one flag-burning, two forced flag lowerings, and a flagpole-chopping — as did Jefferson on several occasions. In particular, Madison pronounced a protest flagburning in Philadelphia in 1802 an actionable violation of law, rather than some form of expression protected by the First Amendment. Plainly, the same Framers who adopted the First Amendment were those who expressed the original understanding of flag protection, and they considered the two to be entirely consistent.

The Framers' articulation of this original intent and understanding long precedes the later, derivative, symbolic interest, and demonstrates the historic consistency between flag protection and the First Amendment. Both Madison and Jefferson treat the flag in terms of its legal significance for sovereignty — not as the public may when it expresses values such as patriotism, or as the defendants may when they express their own values, but as a sovereign nation protects the incidents of its sovereignty. Protection of the flag has continued to serve the nonsuppressive original intent from the Framers' time to the reflagging of the Kuwaiti vessels in the Persian Gulf in 1987. A notion that content-neutral protection of the flag requires a change in the Bill of Rights would have been to the Framers, as it remains today, anathema. This Court should uphold Congress's compliance with *Texas* v. *Johnson* through enactment of the Act.



## ARGUMENT

### I. CONGRESS COMPLIED WITH THIS COURT'S SUGGESTION TO PROTECT NEUTRALLY THE PHYSICAL INTEGRITY OF THE FLAG.

#### A. *This Court's Flag Opinions Recognize A Number of Government Interests, and Ask for An Applicable Interest Apart from Suppressing Unpatriotic Expression.*

When Congress enacted the Act, it drew upon extensive scholarly testimony in support, which marshalled this Court's powerful principles sustaining such legislation.[11] This Court has emphasized that the First Amendment protects "freedom of *speech*" rather than conduct.[12] Congress concluded "[t]he Supreme Court's symbolic speech cases therefore stand for the proposition that the government can regulate conduct with speech elements, as long as that regulation is 'content-neutral,' i.e., the government's purpose was not suppression of free expression." H.R. Rep. No. 231, *supra* p.2, at 7. In *United States* v. *O'Brien*, 391 U.S. 367 (1968), the defendant O'Brien burned a draft card on public courthouse steps in a protest against the Vietnam War, violating 50 U.S.C. App. §462(b)(3) by "knowingly destroy[ing]. . . any such [Selective Service] certificate." The Court upheld the prohibition on expressive burning because it did not depend on what the defendant expressed by the burning, even though Congress adopted it in disapproval of "defiant de-

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[11] *House Hearings* at 48 (Professor Dellinger), 99 (Professor Tribe), and 445 (Professor Sunstein); *Senate Hearings* at 187 (Professor Stone).

[12] "The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." *Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965). In an expressive burning case, "'speech' and 'nonspeech' elements are combined in the same course of conduct," *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). *Texas* v. *Johnson* explained that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 U.S. at 376-77. . . ." 109 S.Ct. at 2540.

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struction and mutilation of draft cards by dissident persons who disapprove of national policy." 391 U.S. at 387 (reprinting Senate committee report).[13]

The statute upheld in *O'Brien* was a 1965 amendment to the Universal Military Training and Service Act which, in response to a series of "protest" draft card burnings, made it illegal to destroy or mutilate a draft card. The House proponents of the bill expressed clearly their intention to address the potential injury to the nation from the protestors' expressions. Armed Services Committee Chairman Mendel Rivers explained that the bill was "a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards. . . . This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government." 111 Cong. Rec. 19871 (1965). Representative Bray, the only other Member to substantially address the merits and rationale of the bill, stated that "[t]he need of this legislation is clear. Beatniks and so-called 'campus-cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers." *Id.*

The Court amply demonstrated its adherence to the bedrock principle of presumed constitutionality of enactments of the people's elected federal representatives in upholding the draft card statute, the statements of the floor proponents notwithstanding. On the basis that there was a governmental interest, administrative convenience,

[13] For example, in *Schacht* v. *United States*, 398 U.S. 58, 60 (1970), the Court struck down the statutory prohibition on wearing an army uniform in a "theatrical. . . portrayal" that "tend[s] to discredit th[e] armed force[s]," 10 U.S.C. §772(f), because the prohibition aimed to suppress the viewpoint that the defendant's conduct expressed ("discredit"). By comparison, *Schacht* noted that a neutral statute that in all circumstances "mak[es] it an offense to wear our military uniforms without authority," would be "standing alone, a valid statute on its face," *id.* at 61, even when applied to expressive conduct.



unrelated to the suppression of expression, which was served by the prohibition on draft card burning, the *O'Brien* Court upheld the statute.

As Justice Blackmun has written, the Court has "often approved restrictions of that kind provided that they are *justified* without reference to the content of the regulated speech. . . ." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added) (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)). The Court has followed Justice Blackmun's reasoning numerous times in declining to strike down "expressive conduct" statutes, whether the conduct be picketing of an abortionist's residence, homeless sleep-ins in Lafayette Park, or other expressive conduct.[14] *San Francisco Arts & Athletics Inc.* v. *United States Olympic Committee*, 483 U.S. 522 (1987), upheld protection of the Olympic flag and logo (described at 526, 533, and 540–41) from infringement, approving such "restrictions on expressive speech" as legitimately a part of the "congressional purpose of encouraging and rewarding the [Olympic] activities." 483 U.S. at 536–37 (citing *United States* v. *O'Brien*).

In particular, Congress relied on the Court's flag opinions, which recognize a range of government interests, some content-related, others, notably the physical integrity interest, content-neutral. In *Street* v. *New York*, 394 U.S. 576, 590 (1969), in which defendant accompanied his flag-burning by the speech that "'if they let that happen to [James] Meredith we don't need an American flag,'" the Court found "four governmental interests":

> (1) an interest in deterring. . . incit[ement to] to commit unlawful acts; (2) an interest in prevent-

[14] *Frisby* v. *Schultz*, 108 S.Ct. 2495 (1988)(picketing abortionist's home); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (homeless sleep-in); *Ward* v. *Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989) (citing numerous precedents); *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding ordinance "*justified* without reference to the content"); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 49 & n.9 (1983).

> ing. . . uttering words so inflammatory that they would provoke others. . .; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring. . . proper respect for our national emblem.

394 U.S. at 590–91.

*Smith* v. *Goguen*, 415 U.S. 566 (1974), a Massachusetts prosecution for wearing a flag on the seat of the pants, focused on several interests arguably at issue, and included this Court's crucial identification of a distinct interest in the physical integrity of the flag. Justice Blackmun offered an opinion of particular importance because it was subsequently approved by the Court, as discussed below, in *Texas* v. *Johnson*, 109 S. Ct. at 2543 n.6, and then served as the major basis for Congress's enactment of the Act. The opinion by Justice Blackmun concluded that Massachusetts "has necessarily limited the scope of the statute to protecting the physical integrity of the flag," and stated that "I, therefore, must conclude that Goguen's punishment was *constitutionally permissible for harming the physical integrity of the flag*. . . ." 415 U.S. at 591 (Blackmun, J., dissenting) (emphasis added).[15] Similarly, in *Spence* v. *Washington*, 418 U.S. 405 (1974), a prosecution for attaching a peace symbol to the flag, the Court noted no fewer than five governmental interests.[16] The Court might well have upheld a statute protecting the ultimate interest in "physical integrity," but concluded that interest did not pertain, since the defendant did

[15] Justice White's concurring opinion linked the interest in "protect[ing] the integrity of that flag" to how "the inherent attributes of sovereignty. . . surely encompass the designation and protection of a flag." *Id.* at 586–87.

[16] These were to (1) "prevent[] breach of the peace," (2) "protect the sensibilities of passersby," (3) "punish for failing to show proper respect for our national emblem," (4) prevent what "might be taken erroneously as evidence of governmental endorsement," and (5) the "interest the State may have in preserving the physical integrity of a privately owned flag." 418 U.S. at 412–15.



not "permanently disfigure the flag or destroy it." *Id.* at 581.

### B. *Congress Complied With Texas v. Johnson, Adopting an Act Which Differs Sharply from the Texas Provision Based on "Serious Offensiveness."*

In sum, this Court's "expressive conduct" cases in general and its flag cases in particular tend to uphold conduct-regulating statutes, even those which in particular cases impinge on expressive conduct, so long as the statutes impose a content-neutral prohibition. Yet as described above, the district court refused to acknowledge Congress's intent to comply with these principles. *Texas* v. *Johnson* had given great weight to Texas's expressly declared intent to prohibit expression of an "offensive" viewpoint, and Texas's expressly declared interests in suppressing expression causing "offense." "Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense.'" *Id.* at 2543 (quoting Texas provision).[17]

This Court did not reach, but rather carefully preserved, the wholly different question, as in *O'Brien*, of a content-neutral statute protecting the physical integrity of the object, draft card or flag, which someone wants to burn and the government wants to protect. In this Court's vitally important language, "The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. [6] Texas concedes as much. . . ." 109 S.

[17] Texas's governmental interest "depend[s] on the onlookers' reaction to the flag-burning," as the prosecution proved at Johnson's trial "by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct," *id.* at 2543 n.7, and as further emphasized by the interests argued by Texas in this Court in avoiding violence by "an audience that takes serious offense at particular expression" and avoiding the particular "serious offense" felt by watchers of flag desecration. *Id.* at 2541–42.

Ct. at 2543. Footnote 6 in *Texas* v. *Johnson* pays homage to Justice Blackmun's position on this key point of the flag's physical integrity: "Cf. *Smith* v. *Goguen*, 415 U.S., at 590–591 (BLACKMUN, J., dissenting) (emphasizing that lower court appeared to have construed state statute *so as to protect physical integrity of the flag* in all circumstances). . . ." 109 S. Ct. at 2543 n.6 (emphasis added). In endorsing and incorporating Justice Blackmun's views, Justice Brennan, who wrote the opinion for the five-justice majority in *Texas* v. *Johnson*, visibly avoided his prior objection to protection of the physical integrity of the flag, by dropping the part of his previous opinion criticizing statutes protecting the flag's physical integrity.[18]

When Congress received scholarly testimony and studied this matter, it paid the most acute attention to *Texas* v. *Johnson*'s reasoning in relying on Justice Blackmun's signal pronouncement. The House Judiciary Report attentively quotes and explains the Court's language,[19] provid-

[18] When Justice Brennan wrote *Kime* v. *United States*, 459 U.S. 949 (1982) (Brennan, J., dissenting from denial of certiorari), he recognized the difference between Texas-type non-neutral statutes, and statutes protecting physical integrity. A non-neutral statute was "different from one that simply outlawed *any* public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor." *Id.* at 954–55 (Brennan, J., dissenting). In *Kime*, as a mere dissenter, he gave an "entirely independent reason," *Id.* at 954, to strike down those "different" statutes protecting physical integrity. Reading *Kime* together with *Texas* v. *Johnson*, Justice Brennan still recognized that statutes protecting physical integrity were different, and now was prepared, on behalf of a majority of the Court, to recognize the full magnitude of that difference by citing approvingly Justice Blackmun's opinion in *Smith* v. *Goguen* that a physical integrity statute was constitutional.

[19] The House Judiciary Committee report on the bill explains that "'[t]he Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others,'" H.R. Rep. No. 231, *supra* p.2, at 8 (quoting *Texas* v. *Johnson*). Similarly, the Senate Judiciary Committee Report explained at length its in-

Continued



ing the following description of the "Purpose of the Bill as Amended":

> The purpose of H.R. 2978, as amended, is to protect the physical integrity of American flags against burning, mutilation, defacing or trampling upon. The bill responds to the Supreme Court decision in *Texas* v. *Johnson* by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances.

H.R. Rep. No. 231, *supra* p.2, at 2. Congress made every aspect of the statute consistent with the intent to comply with *Texas* v. *Johnson*.[20]

### C. *The Eighth Circuit Confirmed Congress's Decision to Comply by Upholding 18 U.S.C. §700 this Year in United States v. Cary.*

In the year since Congress enacted the Act, the Eighth Circuit confirmed the soundness of Congress's decision to comply with *Texas* v. *Johnson* by upholding 18 U.S.C. §700 in *United States* v. *William Charles Cary, Jr.*, No. 88–5458 slip op. (8th Cir., filed Feb. 26, 1990). In *United*

tention to "Protect the Physical Integrity of the Flag in a Manner that Accords with 'Texas' v. 'Johnson,'" S. Rep. No. 152, *supra* p.5, at 4 (heading for section on pp. 4–6), and its intention to adopt a statute which was content-neutral and thereby constitutional, *id.* at 9–15.

[20] Consistent with that intent, prosecutions pursuant to the Federal Flag Act do not "depend on the onlookers' reaction," *id.* at 2543 n.7, and "the testimony of persons who had in fact been seriously offended," *id.*, would not have the role it did in Johnson's trial. The Act does not collect various objects likely to inspire, by mistreatment, the feeling of "serious offense" in an audience the way the Texas provision applied to gravesites, state buildings, chapels, historic sites, and state flags. "Offense," let alone "serious offense," is no element. The Act proscribes actions defined by their effect on the flag without reference to any audience. No audience is needed, and the viewpoint of any audience does not matter.

*States* v. *Cary*, the defendant Cary burned a United States flag in Minneapolis in 1988, during a confrontation similar to the one in *United States* v. *Haggerty* in Seattle in 1989. A district court convicted Cary for burning the flag in violation of 18 U.S.C. §700,[21] and the Eighth Circuit affirmed the conviction, with the entire "issue presented on appeal [being] whether the Supreme Court's recent opinion in *Texas* v. *Johnson*, 109 S.Ct. 2533 (1989), which held the Texas flag desecration statute unconstitutional as applied, mandates that we reverse Cary's conviction." Slip op. at 2–3 (footnotes omitted).

The Eighth Circuit noted that *Texas* v. *Johnson* did not invalidate all flag protection statutes, only those aimed at suppressing particular messages like the Texas provision. It concluded that, for 18 U.S.C. §700, the government had a valid interest "unrelated to the suppression of expression," *id.* at 10 (footnote omitted), because "the government's interest" concerned "Cary's means," namely, his burning the flag in those circumstances, not "the message itself." *Id.* at 12.

As the Eighth Circuit explained, a "conviction [can be] based upon a federal statute which, unlike its Texas counterpart, does not require as an element of the crime that his expressive conduct offend third parties. Furthermore, there is no evidence in the record that anyone on the scene was even offended by Cary's actions or his message." *Cary*, slip op. at 12. The government's interest "on these facts is not related to suppressing debate or disputes between opponents nor does it offend the First Amendment's high purpose. . . ." *Id.* at 12–13. *Cary* sustained 18 U.S.C. §700 because "[t]he federal government's interest in this case, however, does not blossom *only* when a person's treatment of the flag communicates some message. They also arise when the burning is a simple act of

[21] The United States prosecuted Cary pursuant to 18 U.S.C. §700 prior to amendment by the Flag Protection Act of 1989. The statutory amendment was considered by the Eighth Circuit and does not diminish the validity of its reasoning. Slip op. at 10 n.18.



vandalism. . . . Suppression of the expressive element was only incidental. . . [since the government's] interest exists independent of whether the flag burning communicated any message. Therefore, the conviction can be upheld if the government can meet the *O'Brien* test." *Cary*, slip op. at 14.

Since the Seattle case, *United States* v. *Haggerty*, presents overwhelming persuasion that the Flag Protection Act serves a governmental interest unrelated to expression, the Court can and should approve 18 U.S.C. §700 on its face and as applied to *Haggerty*. The *Haggerty* Information sets forth, in its charge of violation of 18 U.S.C. §700, that the defendants burned a flag which was "property of the United States Postal Service." Count II of the Information, J.A. at 35. The *Haggerty* defendants attribute no significance to their having tore down and burned, not their own flag, but a flag posted over the federal building. However, as this Court flatly declared, "[w]e have no doubt that the State or national Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property." *Spence* v. *Washington*, 418 U.S. 405, 409 (1974).[22]

*Cary* reasoned that *Texas* v. *Johnson* left Congress free to enact a flag protection act, like the *O'Brien* draft card burning statute, that forbids that kind of conduct without

[22] This is not to suggest that burning of a flag that is privately owned involves a government interest of suppression. "A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions." *Street* v. *New York*, 394 U.S. 576, 617 (1969) (Fortas, J., dissenting); *see id.* at 605 (Warren, C.J., dissenting) ("I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace")); *id.* at 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense"); *House Hearings* at 140 (Prof. Tribe) (there is "a sense of injury to the Nation whenever any flag, regardless of its technical ownership, is burned").

regard to viewpoint. Thus, *Cary* confirmed Congress's sound decision to comply with *Texas* v. *Johnson*.

## II. THE FOUNDERS' ORIGINAL INTENT SHOWS CONGRESS'S LEGITIMATE INTEREST IN "THE PHYSICAL INTEGRITY OF THE FLAG" AS AN INCIDENT OF SOVEREIGNTY.

Both district courts acknowledged the House *amici's* argument for the sovereignty interest in the physical integrity of the flag. "[T]he House's [brief] conten[ded] that flying the flag to claim sovereignty has a concrete legal purpose and that protecting the flag protects that sovereignty interest." J.S. at 12a. However, the district judge rejected that interest as illegitimate, insisting that "even if Congress does seek to prevent harm to the flag as an incident of *sovereignty*, that interest *relates to the suppression of expression* and is subject to strict scrutiny." *Id.* (emphasis added and footnote omitted). Defendants similarly admitted [23] the sovereignty interest but branded it illegitimate.

In so holding, the district judge, like the defendants, fundamentally erred. When the defendants attempt to characterize the flag as a symbol alone, and the government as having only illegitimate ideological and suppressive interests, they fail to acknowledge that those who both framed the First Amendment and adopted the flag had an original purpose for the flag quite unrelated to ideology or its control. Symbolic interests on which defendants base all their arguments developed only later,

[23] Defendants failed to dispute the historic material presented by the House *amici*, acknowledging what they term House *amici's* "rich historic detail" showing "that the flag is an 'incident of sovereignty'" and admitting "all of the examples offered, from John Endecott's desecration of the British flag in 1634, H.R. Mem. at 18, to James Madison's description of the 'insult' and 'indignity' communicated when the British ship *Leopard* forced the American frigate *Chesapeake* to lower its flag, H.R. Mem. at 28, to the Supreme Court's recognition in *United States* v. *Maine*, 475 U.S. 89 (1986). . . ." Defendants' Reply Memo. in Support of Motion to Dismiss, *United States* v. *Haggerty*, No. CR 89-315 at 17-18 (filed Feb. 7, 1989).



derivatively — after the Framers cast the First Amendment consistent with their belief that the government could protect the physical integrity of the flag.

### A. *Original Understanding And Intent Should Guide Constitutional Consideration, Particularly Concerning the Flag as an Incident of Sovereignty.*

The original intent of the Framers who actually wrote the Bill of Rights provides unique and powerful guidance; it is "contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). As the Court discussed in upholding the constitutionality of legislative chaplains in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), "historical evidence sheds light not only on what the draftsmen intended the [First Amendment] to mean, but also how they thought [it] applied to the practice authorized by the First Congress—their actions reveal their intent." *Id.* at 790. This Court has given the greatest weight to the pronouncements of James Madison, as drafter of the First Amendment and its manager on the floor of the First Congress. *Id.* at 788 & n.8, and sources cited (Madison is among "the men who wrote the First Amendment"). "This Court has previously recognized that the provisions of the First Amendment [were ones] in the drafting and adoption of which Madison and Jefferson played such leading roles. . . ." *Everson* v. *Bd. of Education*, 330 U.S. 1, 13 (1947).[24]

Examination of original intent has special importance in a matter — the flag — for which this Court seeks an objective criterion for judicial review of Acts of Congress.

[24] "The Amendment was proposed by James Madison on June 8, 1789, in the House of Representatives." *McGowan* v. *State of Maryland*, 366 U.S. 420, 440 (1961). "James Madison [is] the author of the First Amendment." *Engel* v. *Vitale*, 370 U.S. 421, 436 (1962). "James Madison was then a leader in the House, as he had been in the [Constitutional] Convention," *Myers* v. *United States*, 272 U.S. 52, 115 (1926) (reciting and following Madison at 111-13, 115-117, 118, 119, 120-21, 123, 125-26, 128-29, and 131).

In his opinion concurring in *Texas* v. *Johnson*, Justice Kennedy noted the strong values at issue: that this was "one of those rare cases" in which to "pause to express distaste for the result," noting the decision's "personal toll" and how "painful this judgment is to announce." 109 S. Ct. at 2548 (Kennedy, J., concurring). Justice Kennedy expressed agreement with the dissent "that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics." *Id.* In this context of strong values, original intent provides an objective polestar, as one Justice recently expressed persuasively. Justice Scalia wrote only last year: "Now, the main danger in judicial interpretation of the Constitution — or, for that matter, in judicial interpretation of any law — is that the judges will mistake their own predilections for the law. . . . Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself." Scalia, *Originalism: The Lesser Evil*, 57 Cinn. L. Rev. 849, 863-64 (1989).

Turning to a definition of the sovereignty interest as the Framers understood it, the law must take sovereignty — a legal matter of enormous importance, like "intellectual property" (trademarks, copyrights, and patents) or the "artificial person" of the corporation -- and concretize it in incidents or instruments with practical legal application. Pure abstractions cannot be infringed or injured by physical acts, and hence cannot be protected, but intellectual property and corporations, having received concretization, can.

Sovereignty is concretized through its incidents. "The word 'nation' as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations." *Montoya* v. *United States, 180 U.S. 261, 265 (1901)* (discussing legal



status of Indian tribe). Absent sovereignty and its incidents, government is "nothing more than a temporary submission to an intellectual or physical superior," *id.* at 265.[25] *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) ("The United States are a sovereign and independent nation. . . . The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States"). "It is also a historical fact that flags, including ours, have played an important and useful role in human affairs," *Smith* v. *Goguen*, 415 U.S. at 587 (White, J., concurring). The D.C. Circuit upheld 18 U.S.C. §700 because "the power to enact such [flag protection] legislation is *an incident of sovereignty* which inheres in the Government of the United States of America as a nation and which the Constitution recognizes and implements." *Joyce* v. *United States*, 454 F.2d 971, 985 (D.C. Cir. 1971) (emphasis added), *cert. denied*, 405 U.S. 969 (1972).[26]

The original intent and understanding of the Framers has always underlain the sovereignty interest. Justice White's concurrence in *Smith* v. *Goguen*, 415 U.S. at 586, declared: "[i]t would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat. 341, c.1, just as they had for

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[25] Regarding incidents of sovereignty, *see, e.g., Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1338 (7th Cir. 1977) ("[p]rotection of federal officials. . . is but a necessary incident of sovereignty"); *United States* v. *State of Texas*, 695 F.2d 136, 141 (5th Cir. 1983) ("exclusive jurisdiction over federal enclaves. . . . is an incident of sovereignty"). Regarding the sorting of sovereignty claims, *see, e.g., Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1009-1015 (2d Cir. 1974); *Holiday Inns* v. *Aetna Insurance Co.*, 571 F. Supp. 1460, 1500-01 (S.D.N.Y. 1983), and cases cited.

[26] This Court cited approvingly both 18 U.S.C. §700 and *Joyce* v. *United States* when explaining that "Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *Smith* v. *Goguen*, 415 U.S. 566, 582-83 & n.30 (1974).

the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777);" accordingly, "[Congress's] powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag." *Id.* Similarly, *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907) (discussed approvingly in *Texas* v. *Johnson*)[27] also took original intent — "it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag. . . ." — as underlying the sovereignty interest — the flag as an instrument of "National sovereignty" relating to "the existence and sovereignty of the Nation." As noted above, the legislative history of the Act drew on the various exponents of the sovereignty interest from "the Founders" and the Continental Congress to Woodrow Wilson. All this necessitates scrutiny of the original adoption and protection of the flag.

B. *Adoption and Protection of the Flag Were Originally Intended to Obtain Proper Treatment as a Sovereign Nation.*

The Framers' adoption and protection of the flag served a practical interest quite apart from suppression of unpatriotic viewpoints: the interest in obtaining proper treatment for the country and its citizens. Chief Justice Rehnquist noted this practical interest. "One immediate result of the flag's adoption was that American vessels harassing British shipping [during the Revolutionary War] sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such

[27] *Texas* v. *Johnson* stands by *Halter* v. *Nebraska* as one of "our precedents" to be followed. 109 S.Ct. at 2545 (citing *Halter*). "Our decision in *Halter* v. *Nebraska*, 205 U.S. 34 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is *not to the contrary*" to *Texas* v. *Johnson* itself. 109 S.Ct. at 2545 n.10 (emphasis added). Other of *Halter*'s positions may be valid, simply for "purely commercial rather than political speech. 205 U.S. at 38, 41, 42, 45." *Id.*, 109 S.Ct. at 2545 n.10.



seamen were treated as prisoners of war." *Texas* v. *Johnson*, 109 S. Ct. at 2549 (Rehnquist, J., dissenting). An eminent historian, Barbara W. Tuchman, discussed precisely that concrete legal and historical situation, explaining the Founders' adoption of the flag as part of sending forth a navy. "A flag was as necessary as commodore or crew, for a national navy was nothing without it. . . . [F]or a ship on the trackless seas it was a necessity as a sign of identity so that it should not be taken for a pirate." B.W. Tuchman, *The First Salute* 47 (1988). In other words, both the Chief Justice and Tuchman point to the eminently practical legal aspect of the flag, as an incident of sovereignty, to describe the actual historical adoption of the flag — not ideology, patriotism, or suppression of viewpoints.

Understanding this original intent requires recapitulating the flag's historical legal background, which this Court discussed in analyzing colonial-era "assertion of sovereignty over Nantucket Sound" under "international law" (as that background affects the current title to the Sound). *United States* v. *Maine*, 475 U.S. 89, 96 & n.11 (1986). As the Court noted, from the thirteenth century on, England maintained its sovereignty over particular bodies of water through a requirement that ships salute the English flag:[28] "in general the formal requirement of the salute to the flag was maintained. . . . [T]he requirement of the flag ceremony was ended in 1805." *Id.* at 97 n.11 (quotation omitted).

[28] *United States* v. *Maine* quotes at length from L. Brownlie, *Principles of Public International Law* (2d ed. 1973), which cites, at 233 n. 3, "For the history see [T.W.] Fulton, *The Sovereignty of the Sea[: An Historical Account . . . with Special Reference to the . . . Naval Salute*] (1911)." Fulton explains the flag salute as follows: "the custom of lowering the top-sails and striking the flag" had its "earliest indication. . . [in] the much-discussed ordinance which King John issued in 1201." *Id.* at 6-7. *See* J. Selden, *Of the Dominion, Or, Ownership of the Sea* 401-02 (1972 reprint of 1652 ed.)' (classic treatise quoting King John's law).

England enforced this "requirement of the flag ceremony" with the Dutch and French by war. Three Dutch-English wars occurred, with a sovereignty interest in the flag as chief causes, until "the accession of William of Orange to the English throne in 1689 [ended] English disputes with Holland." *United States* v. *Maine*, 475 U.S. at 97 n.11. Thereafter, English "sovereignty of the sea was still asserted against France" again through the "requirement of the flag ceremony," *id.*, enforced by war.[29] This enormously serious background — of wars fought for protection of a sovereignty interest projected by the flag — remains familiar in law today, such as in the reflagging in the Persian Gulf in 1987, as discussed below.

Thus, the Framers inherited a legal tradition of the flag's protection as a practical instrument affecting title to areas of land and water, rights of trade and citizenship, causes of war citable in international law, and similar matters with the utmost weight. Chief Justice Rehnquist and Tuchman quite correctly note that the British insistence on hanging American rebel seamen as pirates[30] necessitated American flag adoption and protec-

[29] Fulton, *supra* n.28, at 12-13 (Dutch admiral's "refusal to lower his flag. . . precipitated the first Dutch War."); *id.* at 15 (same for third war). *See* B. Cumberland, *History of the Union Jack* 119-27 (2d ed. 1900). "Louis XIV, however, gave his officers strict orders to refuse to perform the [flag] ceremony, and in the Declaration of War in 1689 William III [of England] made this one of his chief complaints against that monarch." T.C. Wade, Introductory Essay, in J. Boroughs, *The Sovereignty of the British Seas* (1920 ed.), at 34-35 (footnote omitted).

[30] G.H. Preble, *History of the Flag of the United States of America* 237 (1880) (quoting original English letter showing English belittling of colonial flag and claims of sovereignty). "England considered as pirates all those not sailing under an established flag, and the usual punishment for proven pirates was death on the gibbet." Rankin, *The Naval Flag of the American Revolution*, 11 Wm. & Mary Q. 339, 340 (1954) (footnote omitted). The English captured American privateers flying non-sovereign flags, *id.* at 227, and treated them as pirates, impeding recruitment. L. Lorenz, *John Paul Jones* 55 (1943) (Jones explains that officers refused commissions; they did "not choose to be hanged"); *id.* at 151-52 (Jones describes how "the Parliament of England had authorized George III to consider and to treat all Americans taken at sea who were armed as traitors, pirates, and felons," and how "[n]ever before had history furnished us the example of a people arrogant enough to assume sovereignty with such deliberate cruelty").

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tion; the law and the practical understanding of sovereignty linked the flag to sovereignty status above the piratical. *See United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (treating a ship without the "protection of the flag" as a pirate).

Accordingly, the Continental Congress had sound legal and practical reasons to tie closely its establishing and protecting the sovereign flag to its establishing a navy. The Continental Congress did so in several enactments,[31] including officially adopting the Stars and Stripes by the famed ordinance "*Resolved*, That the flag of the thirteen United States be thirteen stripes alternate red and white; that the union be thirteen stars, white in a blue field, representing a new constellation." VIII J. Continental Cong. 464 (June 14, 1777). "It was necessary to provide an authorized national flag. . . for England considered armed [American] vessels without such a flag as pirate ships and hanged their crews when they captured them. So the Marine Committee of the Second Continental Congress presented the Resolution, which was on the subject

[31] On October 13, 1775, the Continental Congress appointed a Naval (later Marine) Committee, with authority to purchase and equip four armed ships, aboard which John Paul Jones hoisted the first sovereign flag (the "Grand Union") on December 3, 1775. B. Tuchman, *supra* p.25, at 46-48. On October 29, 1776, the Continental Congress adopted the resolve which reserved sovereign flags to the official navy ships. VI J. Continental Cong. 909 (Oct. 29, 1776); G.H. Preble, *supra* n.30, at 245. When Jones confronted a Captain Thomas Truxton acting disobediently to this resolve, much like the case of *The King* v. *Barnes* discussed below, Jones rebuked him for "flying in the Face of a positive Resolution of Congress" and for violating "the Flag and Sovereignty of the United States." Letter from John Paul Jones to Thomas Truxton (Oct. 24, 1780) *reprinted in* Peter Force Collection of John Paul Jones Letters and Documents 1244 (available in Manuscript Division, Library of Congress).

of the Navy,"[32] adopting that resolution when it dispatched John Paul Jones, leader of the navy, aboard the *Ranger*.[33] Naturally, the Continental Congress tied enactments and reports on the navy's effectiveness to the sovereignty interest in the flag.[34]

Moreover, the new navy's activities successfully generated flag sovereignty issues useful to the key Framers, Benjamin Franklin and John Adams, who were ministers to the French and Dutch.[35] For example, an American

[32] T.C. Jones, *So Proudly We Hail: Keystones of American Freedom* 55 (1981).

[33] On June 14, 1777, the Continental Congress adopted two resolves: "*Resolved*, That the flag of the thirteen United States be [the Stars and Stipes]," and "*Resolved*, That Captain John Paul Jones be appointed to command the ship Ranger." VIII J. Continental Cong. 464, 465 (June 14, 1777). "[T]he Flag Resolution came from the Marine Committee and the flag it described became known as the 'Marine Flag.'" S.M. Guenter, *The American Flag, 1777-1924* 34 (1990). Historians tie the flag resolution to the other naval business from the Marine Committee taken up by the Continental Congress that day. G.H. Preble, *supra* n.30, at 260; M.M. Quaife, *The Flag of the United States* 67 (1942); W. Smith, *The Flag Book of the United States* 55 (1975 rev. ed.); J.H. Sherburne, *The Life and Character of John Paul Jones* 39 (1851) ("connexion" with *Ranger*).

[34] A Board of Admiralty heard from Benjamin Franklin about Jones' actions "under American Commissions and Colours," A.H. Smyth, 8 *The Writings of Benjamin Franklin* 226 (1907); that Board reported to the Continental Congress that Jones "hath made the Flag of America respectable among the Flags of other nations," through his "Squadron under the Flag and Laws of these States." XIX J. Continental Cong. 320 (Mar. 28, 1781). The Continental Congress thereupon enacted a resolution regarding how Jones "hath supported the honor of the American flag." *Id.* at 386 (Apr. 13, 1781).

[35] "The number of letters written by Franklin directing naval operations made him virtually an overseas Secretary of the Navy. His letters contained constant references to the 'American Flag'." *Rankin*, *supra* n.30, at 350. For Franklin's and Adams' role vis-a-vis John Paul Jones, *see, e.g.*, 7 A.H. Smyth, *supra* n.34, at 157-58 (Franklin offer to Jones of "the commission and flag of the United States"); *id.* at 249 (Jones hopes "never to tarnish the honour of the American Flag"); *id.* at 297 (Franklin's offer to Jones of "an American Expedition, under the Congress' Commission and Colours"); 8 *id.* at 66 (Jones "under

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flag integrity incident served to make the Dutch our ally in the war with the English in 1780.[36] Thus, the original intent and understanding regarding the flag plainly consisted of sovereignty concerns of high importance, not ideology or viewpoint suppression which the defendants erroneously claim to be the sole possible governmental interest.

### C. *Madison's and Jefferson's Views Establish the Consistency, as a Matter of Original Intent and Understanding, Between the First Amendment and Flag Protection.*

Along with the foregoing interactions among nations, a tradition had long developed of punishing flag defacers: "it has often occurred that insults to a flag. . . and indignities put upon it. . . have often been resented and sometimes punished on the spot." *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907). The Framers' part in this tradition demonstrates the historic core of consistency between flag protection and the First Amendment. That tradition developed from pre-Framer adjudications and incidents which

American Commission and Colours"); *id.* at 78 (Franklin reports to Congress that Jones "has done great honour to the American flag"); *id.* at 102 (Franklin questioning whether the Dutch complain of "a violation of the Flag of their Nation"); Lorenz, *supra* n.30, at 496 (Adams in 1782 envisaging "ships of the line under the American flag and commanded by Paul Jones"). *See also* 27 *The Papers of Benjamin Franklin* 525 (C.A. Lopez ed. 1988) (letter of Oct. 9, 1778 that Sicily "hath ordered the ports of [its] Dominions to be open to the Flagg of the United States of America."); 7 A.H. Smyth, *supra* n.34, at 74 (Franklin advising American captains "to avoid giving any offence to Flaggs of Neutral powers, and to shew them proper marks of Respect and Friendship.").

[36] John Paul Jones' extraction of a flag salute figured as a cause of war with Holland. B. Tuchman, *supra* p.24, at 92. In Parliament's debate on the declaration of war, Lord North denounced the Dutch for "saluting a rebel privateer at St. Eustatia," 21 Parl. Hist. Eng. 1081 (1780); the English had demanded from the Dutch "a formal disavowal of the salute by Fort Orange, at St. Eustatia, to the rebel ship," *id.* at 1080 n.* (quoting diplomatic demand), since Jones' ship was "under the American flag." *Id.* at 960 n.*

set the stage for Madison's pronouncements. "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted," *Halter* v. *Nebraska*, 205 U.S. at 41. In America, the tradition that "insults to a flag. . . and indignities put upon it. . . [are] sometimes punished," *id.*, 205 U.S. at 41, started with one of the earliest prosecutions in American history: *Endecott's Case*.

In the 1600s, just as England had proceeded against those who failed to treat properly the flag,[37] so Massachusetts colonists prosecuted, tried, and convicted a domestic defacer of the flag in 1634. "John Endecott, who was to become governor of Massachusetts ten years later, cut part of the cross from the flag at Salem. Formal complaint was entered that the flag had been defaced by Endecott. . . ." 9 Encyclopedia Britannica 402 (1972) (article on "Flags"). A contemporary governor's account explains "that the ensign at Salem was defaced," and he elaborates the charge against Endecott: "Much matter was made of this, as fearing *it would be taken as an act of rebellion, or of like high nature, in defacing the king's colors*." J. Winthrop, *The History of New England from 1630 to 1649* 175 (J. Savage ed. 1953)(emphasis added).[38]

[37] Selden's 1652 treatise, previously described, had translated King John's law of 1201 as prescribing that those failing to give the salute described in *United States* v. *Maine* as required by sovereignty of the seas "are to bee reputed enemies if they may bee taken, yea and their Ships and Goods bee confiscated as the Goods of Enemies. . . . [T]he Persons, which shall be found in this kinde of Ships, are to bee punished with imprisonment, at discretion, for their Rebellion." J. Selden, *supra*, n.28 at 401–02 (translating King John's law). Selden explains: "Penalties also were appointed by the King of *England*, in the same manner as if mention were made concerning a crime committed in som Territorie of his Island." *Id.* at 402.

[38] In fact, the colonists so much feared English reaction, that their leaders specially informed the home country. "The assistants met at the governour's, to advise about the defacing of the cross in the ensign at Salem, where (taking advice with some of the ministers) we agreed to write to Mr. Downing in England, of the truth of the matter, under

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Winthrop gives this contemporary account of the trial:

> Mr. Endecott was called into question about the defacing. . . . [A committee of colonists] taking the charge to consider the offense, and the censure due to it, and to certify the court, after one or two hours time, made report to the court, that they found his offense to be great. . . giving occasion to the State of England to think ill of us; — for which they adjudged him worthy [of] admonition, and to be disabled for one year from bearing any public office. . . .

*Id.* at 188–89.[39]

*Endecott's Case* establishes a key historic point: from the earliest days of the legal system in America, the law deemed an individual to be engaging in a punishable act for defacing a flag, even domestically, even in peacetime. Defacing the flag invaded a sovereign governmental interest, even when undertaken for reasons of protest. At the time, the colonists saw the need to punish the act in clear sovereignty terms: that defacing the flag "would be taken as an act of rebellion, or of like high nature," even when unaccompanied by danger of violence or general revolt. This continued to be the law, as established by other flag cases punishing other failings in flag integrity, down through prosecutions and fines[40] at the time of the

all our hands, that, if occasion were, he might show it in our excuse; for therein we expressed our dislike of the thing [*i.e.*, the defacing], and our purpose to punish the offenders. . . ." *Id.* at 179.

[39] What matters is not, of course, the interesting but hypothetical question whether the colonists' case against Endecott would meet the test of *Texas* v. *Johnson*. The flag of England consisted at the time of a square of white with a large red cross of St. George, to which Endecott objected out of religious belief. Endecott's fellow colonists seem to have had tolerance, but even sympathetic fellow colonists knew, for the law, flag defacing was prohibited, not with regard to the expressive intent, but because the act itself, whether expressive, was an "act of rebellion."

[40] Seamen "were not infrequently brought before the courts and fined for refusing to strike [the flag]. If a merchant vessel refused to strike until she was shot at, she was compelled to pay to the king's

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Revolution, *The King* v. *Barnes*, 167 Eng. Rep. 473 (Court of Admiralty 1767) (concerning a Charleston incident),[41] and to the early decisions of this Court. *See, e.g., The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 52 (1825) (United States captain justified in firing upon ship committing an "indignity to the national flag").

As noted above, this Court has declared repeatedly that Madison's vital role in drafting the First Amendment makes him an authoritative source for original intent; this is particularly so on sovereignty matters. Madison consistently emphasized, as Jefferson's Secretary of State, the legal significance of infractions of the physical integrity of the flag. His earliest pronouncement concerned the incident "in October, 1800, when the Dey of Algiers forced a United States man-of-war, most inappropriately named the *George Washington*, to haul down the flag of the proud young republic, replace it with that of Algiers, and sail to Constantinople." T.A. Bailey, *A Diplomatic History of the American People* 101 (1969). Secretary of State Madison pronounced such a situation, as a matter of international law, a dire invasion of sovereignty which "on a fit occasion" might be "revived."[42] Shortly thereafter, "the Pasha of Tripoli declared war on the United States by the established custom of chopping down the

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ship twice the value of the gunpowder and shot expended." Fulton, *supra*, n.28 at 207. See II *Documents Relating to Law and Custom of the Sea* (R.G. Marsden ed. 1916), at 88 (describing fines).

[41] In 1766, the Court of Admiralty tried a ship captain, one John Barnes, "for hoisting illegal colours. . . . near the Port of Charles Town in South Carolina. . . ." Barnes had on his ship "in open violation of the said Instructions and in contempt. . . of *the right of sovereignty* of the King. . . hoist[ed] a pendant at his masthead, and other colors which ought only to be worn by men-of-war." *Id.* at 474 (emphasis added).

[42] II *American State Papers* 348 (Lowrie and Clarke ed. 1832). "One subject of equal importance and delicacy still remains. The sending to Constantinople the national ship of war the 'George Washington,' by force, *under the Algerian flag*, and for such a purpose, has deeply affected the sensibility, not only of the President, but of the people of the United States." *Id.* (emphasis supplied).



flagpole of the consulate (May 14, 1801)." S.F. Bemis, *A Diplomatic History of the United States* 176 (5th ed. 1955). Madison's agents discussed with him how violation of the physical integrity of the flag had meant war.[43]

Thus, knowing the flag's history, knowing intimately the thinking behind the initial adoption and protection of the flag, and having these fresh reminders, in 1802 Madison readily pronounced a flag defacement in the streets of an American city to be a violation of law. Specifically, Madison pronounced a flag defacement in Philadelphia as actionable in court, as Judge Bork recently described this historic pronouncement:

> [t]he tearing down in Philadelphia in 1802 of the flag of the Spanish minister, "with the most aggravating insults," was considered actionable in the Pennsylvania courts as a violation of the law of nations. 4 J. Moore, *Digest of International Law* 627 (1906) (quoting letter from Secretary of State Madison to Governor McKean (May 11, 1802)).

*Finzer* v. *Barry*, 798 F.2d 1450, 1456 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds*, *Boos* v. *Barry*, 485 U.S. 312 (1988). In other words, when the Philadelphians tore down the Spanish flag, and Madison was informed, he wrote the state Governor that he considered tearing down the flag "a violation of the law of nations."

Plainly, the same Framers who adopted the First Amendment were those who expressed the original understanding of flag protection, and they considered the two to be entirely consistent. This area of the law, and hence the judgment that flag defacing was an actionable violation of the law, fell within both Madison's area of jurisprudential expertise recognized among the Framers,

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[43] The United States consul on the scene wrote Madison that the Pasha told him "that he declared war against the United States, and would take down our flag-staff on Thursday. . . our flag-staff was chopped down six feet from the ground, and left reclining on the terrace." II *American State Papers* 355 (1832).

and his weighty responsibility as Secretary of State.[44] Madison did not conclude, as defendants urged in these cases, that the First Amendment protected Americans' rights to tear down a flag or that flag defacing was a form of expression protected by his First Amendment. Madison had long and intimate familiarity with the significance of physical integrity of flags, as well as knowledge of the First Amendment that he drafted and moved through the First Congress, and he knew there had been no intent to withdraw the traditional physical protection from the flag.

One last incident illustrates precisely Madison's awareness of the important interest tied to the flag. While Madison was Secretary of State, in the years leading up to the War of 1812, England infuriated America by "impressment," the English navy's practice of disregarding American flag sovereignty in "impressing" into service (*i.e.*, drafting) men, ostensibly deserters, found aboard American ships. In a historic episode of an impressment-related attack, Secretary of State Madison himself directly told the British Ambassador "'that the attack on the *Chesapeake* was a detached, flagrant insult to *the flag and sovereignty* of the United States.'"[45] A Madison letter to James Monroe scored "the indignity offered *to the sovereignty and flag* of the nation. . . [which] demands. . . [as] an honorable reparation. . . . an entire

[44] Madison established early his expertise among the Framers in sovereignty matters. *See The Federalist, No. 42* 279-287 (J. Cooke ed. 1961); *id.*, No. 53, at 364; 3 M. Farrand, *Records of the Constitutional Convention* 332 (1911).

[45] I. Brant, *James Madison: Secretary of State 1800-1809* 413 (1953) (quoting British dispatch) (emphasis added). The British *Leopard*, directed to search for deserters, had intercepted and fired upon the American frigate *Chesapeake*. "[I]n ten or twenty minutes the flags of the frigate were lowered." D. Malone, *Jefferson the President: Second Term, 1805-1809* 421 (1974).



abolition of impressments from vessels *under the flag of the United States*. . . ."[46]

Like Madison, Jefferson protected the sovereignty interest in the flag, recognized its complete consistency with the Bill of Rights, and deemed abuse of that interest a serious matter of state, not some form of suppression of protected expression. Jefferson expressed his understanding most clearly in the context of the American sovereignty interest in trade rights. During the period of foreign war and blockade in the 1790s, the American flag was a neutral flag, and the law of trade[47] made foreign ships desire to fly it. As Washington's Secretary of State, Jefferson instructed American consuls to punish "usurpation of our flag." "You will be pleased, also. . . to give no countenance to the usurpation of our flag by foreign vessels, but rather, indeed, to aid in detecting it. . . ." 9 *The Writings of Thomas Jefferson* 49 (mem. ed. 1903). *Accord, id.* at 54, 56-57 (other Jefferson letters). Jefferson, as President, similarly urged "systematic and severe" punishment for flag abuse in 1807: "It is impossible to detest more than I do the fraudulent and injurious practice of covering foreign vessels and cargoes under the American flag; and I sincerely wish a systematic and severe course of punishment could be established." 11 *id.* at 410. More generally, he wrote on July 10, 1806, emphasizing the "inviolability of our flag in its commerce with her enemies. We shall thus become,. . . honestly neutral, and truly

[46] Letter from James Madison to James Monroe (July 6, 1807) (Exhibit 18 to Brief for the Speaker and Leadership Group of the U.S. House of Representatives, *Amici Curiae*, *United States* v. *Haggerty*, (No. CR 89-315, filed Jan. 29, 1990) (available in the National Archives)). Its background, and a partial quotation, are in B. Perkins, *Prologue to War: England and the United States, 1805-1812* 145-46 (1961).

[47] A blockading nation cannot seize ships flying a neutral flag unless they carry contraband. *See, e.g. The Pedro*, 175 U.S. 354, 366-67 (1899); *Rose* v. *Himely*, 8 U.S. (4 Cranch) 240, 277 (1808) ("safety" of neutral flag).

useful to both belligerents [France and Spain]." 11 *id.* at 120. *See* 8 Annals of Cong. 14 (1803) (Jefferson message).

D. *The Original Intent has Continuing Significance.*

From the time of Madison and Jefferson to the current Act of Congress, protection of the flag has continued to serve the Framers' non-suppressive original intent.[48] For example, in 1915, Members of Congress challenged British abuse of American flags to evade the enemy at sea — much as Jefferson had protested such abuse in 1793 and 1806–07 — by noting that "[w]e use a flag. What does it mean? It means American sovereignty, and will be defended in connection with all that American sovereignty means"; President Wilson, cited in the 1989 Act's legislative history, agreed in protesting to the British in 1915 and 1916.[49] Congress relied on many such incidents in enacting 18 U.S.C. §700.[50]

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[48] This Court described United States taking of sovereignty over territories as the time of "change of flags." *Glasgow* v. *Baker*, 128 U.S. 560, 562 (1888); *United States* v. *Moore*, 53 U.S. 209, 222 (1851); *United States* v. *Acosta*, 42 U.S. 24, 27 (1843); *United States* v. *Heirs of Clarke*, 41 U.S. 228, 231 (1842). Similarly, the Court described how planting "a declaration. . . wrapped with the Hawaiian flag. . . [gave] sovereignty over Palmyra. . . ." *United States v. Fullard-Leo*, 331 U.S. 256, 261, 269 (1947). *See* S.M. Guenter, *The American Flag, 1777-1924* 49 (1990) (1820s and 1830s incidents); H. Wheaton, *Elements of International Law* 163–64 (1855)(Secretary of State Daniel Webster in 1842 states ship's crews "find their protection in the flag" as part of "'[t]he sovereignty of the state'").

[49] 52 Cong. Rec. 3595 (1915); 16 *Messages and Papers of the Presidents* 8056 (1924) (reprinting Wilson's Secretary of State's 1915 protest to Britain over the "legality and propriety of deceptive use of the flag"). In 1916, when the British seized American flag vessels, Wilson's Secretary of State protested that "nationality finds visible expression in the right to fly a flag. . . [which] makes them amenable to the sovereignty and to the laws" of America alone. *Papers Relating to the Foreign Relations of the United States, 1916 Supplement*: H. Doc. No. 810, 69th Cong., 2d Sess. 358 (1929).

[50] "It is difficult to demand apologies from other countries in which our flag is burned and torn to shreds, when we do nothing here at

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Most recently, in 1987 the United States reflagged Kuwaiti tankers to project American sovereignty in the Persian Gulf. Secretary Weinberger testified, in an explanation close to those of Madison or Wilson, "we obviously feel a particular obligation to ships carrying the American flag. . . we believe they are entitled to the kind of protection that we give all of our citizens. . . ."[51] In then-Senator Quayle's summation, "[o]bviously an attack on that tanker with our flag would be an attack upon us."[52] The State and Defense departments themselves cited in 1987 the previously-described precedent of President Wilson, and explained that "our Navy will be there. . . to offer the protection to the flag."[53] Thus, the Framers' original understanding of flag protection in sov-

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home when the same thing happens." *Desecration of the Flag: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 37 (1966) (Rep. Quillen). *See, e.g.*, 2 J.B. Moore, *Digest of International Law* 136 (1906) (1863 protest of Nicaraguan "forcible and violent removal of the [American] flag"); 5 M.M. Whiteman, *Digest of International Law* 178 (1972) (1958 Peruvian destruction of American flag, in connection with visit of Vice President Nixon); *id.* at 179 (1959 Panamanian destruction of American flag); *id.* at 180 (1960 Venezuelan burning of American flag).

[51] *The Policy Implications of U.S. Involvement in the Persian Gulf: Joint Hearings By Investigations Subcomm. & Defense Policy Panel of the House Comm. on Armed Services*, 100th Cong., 1st Sess. 36, 48 (1987). Asked "[u]nder international law, what is the legal effect when we reflag the ships?" Secretary Weinberger testified that "They are American ships, as I said." *Id.* at 37.

[52] *U.S. Military Forces to Protect "Re-Flagged" Kuwaiti Oil Tankers: Hearings Before the Senate Comm. on Armed Services*, 100th Cong., 1st Sess. 59 (1987); *accord*, *id.* at 10 ("it is not only showing the flag that is important, but maintaining the flag") (Sen. Glenn); *id.* at 107 ("You know, the flagging is a statement of power") (Sen. Shelby).

[53] *U.S. Policy in the Persian Gulf: Hearing Before Subcomms. of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 18 (1987) (language regarding protection); *Kuwaiti Tankers: Hearings Before the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 73 (1987) (analogy to Wilson's position in 1915–16).

ereignty terms, unrelated to any suppressive notions, remains alive in the Persian Gulf today.[54]

In the most famous domestic destruction after the Framers' era, Lincoln kept Fort Sumter's flag, reportedly the crucial link to sovereignty,[55] flying in April, 1861 "to maintain visible possession"; Lincoln described the challenge to it as seeking "to drive out the visible authority of the Federal Union, and thus force it to immediate dissolution." *Message of the President of the United States*, Cong. Globe App., July 4, 1861, at 1.[56] Similarly, this Court described how Union occupiers of New Orleans in 1862 "required the authorities to display the flag of the Union from the public buildings. . . . [and then] directed the flag to be raised upon the Mint," *The Venice*, 69 U.S. (2 Wall.) 258, 275 (1864), as an incident of the "sovereignty of the United States."[57] "[T]he flag. . . . was raised

[54] Defendants admitted "the function the flag serves on a ship in the Persian Gulf." Defendants' Reply Memo. in Support of Motion to Dismiss, *United States* v. *Haggerty*, No. CR 89-315 at 17-18 (filed Feb. 7, 1989).

[55] Lincoln received a requested report from Charleston that "four miles down the Harbor the Standard of the U. States floated over Fort Sumpter the only evidence of jurisdiction and nationality." Letter to Abraham Lincoln, Mar. 27, 1861, R.T. Lincoln Coll., at 8389 (available in Manuscript Division, Library of Congress); *see* R.N. Current, *Lincoln and the First Shot* 73 (1963).

[56] Lincoln wrote that dispatch-bearers to Charleston should parley with the governor "if on your arrival there the flag of the United States shall be flying over Fort Sumter," and a relief expedition "finding your flag flying, will attempt to provision you." IV *The Collected Works of Abraham Lincoln* 323 (Basler ed. 1953); I *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 235, 245 (1880); R.N. Current, *supra*, n.55 at 101-02, 108-09. The fort's defenders would not fire "unless compelled to do so by some hostile act against this fort or the flag of my Government." *War of the Rebellion*, *supra*, at 23. Ultimately, the flag was shot down, and the Confederate flag raised. *Id.* at 23 and 29. "[T]he attack on Fort Sumter" began hostilities. *The Prize Cases*, 67 U.S. (2 Black) 635, 669 (1862).

[57] Captain Farragut's order is described in *The Venice*; its text is quoted in J. Parton, *General Butler in New Orleans* 70 (1864).



accordingly, but was torn down on the same or the next day," *The Venice*, 69 U.S. at 277; the responsible individual was tried and convicted.[58]

Soon thereafter, the State Department pronounced the United States, to maintain its sovereignty, "fully empowered and authorized to prevent the abuse and disgrace of its national emblem both at home and abroad." 2 J.B. Moore, *supra* n.50, at 135. Repeatedly, the State Department addressed domestic flag destructions, even in protests, as sovereignty incursions unshielded by the First Amendment, such as regarding domestic acts against the German flag in 1935 and 1941.[59]

The Framers' articulation of this original intent long preceded the later, derivative, symbolic interest:

> the reverence which all Americans today pay to their flag was foreign to the minds of the men of 1777. A flag was essential to the conduct of warfare between ships at sea, and the Congress met the need. . . . It is obvious that their action was animated by considerations of practical need, and but slightly, if at all, by sentiment. . . .

M.M. Quaife, *The Flag of the United States* 66-67 (1942). By 1907, this Court in *Halter* v. *Nebraska* could refer both to the sovereignty interest, and to the flag as an emblem, and it could sanction both the past pattern that "insults to a flag. . . and indignities put upon it. . . have often been resented and sometimes punished on the spot," *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907), and the developing pattern (which it approved) of statutory protection.

What the original intent demonstrates is something which transcends the specific formulations of one era or

[58] G.H. Preble, *supra*, n.30 at 473 (reprinting sentencing order for William B. Mumford for the "overt act thereof in tearing down the United States flag from a public building of the United States. . . .").

[59] 2 G.H. Hackworth, *Digest of International Law* 128 (1941) (1935); 5 M.M. Whiteman, *supra*, n.50 at 174-75 (1941 Navy court-martial for tearing down German flag). *Accord*, 2 J.B. Moore, *supra*, n.50 at 140-41 (1897 California burning of Portuguese flag); *id.* at 140-41 (1899 hauling down of German flag).

another, namely, the historic core of consistency between flag protection and the First Amendment which left room for those various formulations. Madison and Jefferson established the original understanding that the government could treat the flag in terms of its legal significance — not as the public may when it expresses values such as patriotism, or as the defendants may when they express their own values, but as a sovereign nation acts, apart from whatever the public or defendants have as their values, in protection of its sovereignty. The Framers intended the government to be able to protect the flag under the original Bill of Rights. A notion that such protection requires a change in the Bill of Rights would have been to them, as it remains today, anathema.

## CONCLUSION

The Flag Protection Act of 1989 amends the prior federal law to be content-neutral. It follows the Framers' original intent that flag protection accords perfectly with the Bill of Rights. Consistent with Congress's intent to comply with *Texas* v. *Johnson*, this Court should uphold the Act.

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